IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-206

No. Misc.

JOHN C. NUNLEY,

Petitioner,

—against—

DANIEL GUIDO, COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU,

Respondent,

Reviewing the Determination of the Respondent in Dismissing Petitioner, John C. Nunley, from the Police Department, County of Nassau.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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Cases Cited

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To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

The petitioner, John C. Nunley, prays that a writ of certiorari issue to review the order of the New York State Supreme Court, Appellate Division, Second Department, which affirmed a judgment of conviction rendered in a disciplinary proceeding held by the Nassau County, New York Police Department, rendered July 6, 1977, convicting petitioner after a hearing of a violation of Police Department Rules and Regulations and sentencing him to a discharge from the Police Department.

Opinions Below

The opinion of the New York State Supreme Court, Appellate Division, Second Department, as yet unreported, is attached hereto. Leave to appeal to the New York Court of Appeals was denied on June 3, 1978 (see Order Denying Leave, attached hereto).

Jurisdiction

The Order of the New York State Court of Appeals Denying Leave to Appeal to that court was denied on June 8, 1978.

Jurisdiction is conferred under 28 U S C 1257.

Question Presented

Whether petitioner's right to be represented by the attorney of his choice and whether petitioner's right of an opportunity to defend himself were violated.

Constitutional Provisions and Statutes Involved

This case involves the Sixth Amendment to the United States Constitution.

Statement of the Case

That on or about the *14th day of January, 1972,* petitioner was appointed a patrolman with the Police Department of the County of Nassau, State of New York.

On or about the 6th day of January, 1977, petitioner was served with police department charges that:

> "1. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, engaged in unlawful conduct, in that, police officer Nunley did, without justification, fire a loaded gun at a cigarette machine, thereby *recklessly endangering* other people who were present in and about Mother's East Pub.
>
> 2. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, engage in unlawful conduct, in that, police officer Nunley, having no legal right to do so, nor any reasonable ground to believe he had such right, *intentionally* damaged the property of another person when discharged a loaded firearm into a cigarette machine.
>
> 3. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville

Road, Bethpage, New York, fail to exercise the utmost care in the handling of a firearm, in that, police officer Nunley unjustifiably displayed a loaded firearm in a tavern with others present and discharged said loaded firearm into a cigarette vending machine.

4. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, while not lawfully hunting or target shooting, fail to report as soon as practicable to the Commissioner of Police, through official channels, that he had discharged two shots from a loaded firearm into a cigarette vending machine while present at a bar in Bethpage, New York.

5. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, while off duty and not in uniform, fail to carry .38 special caliber departmental issue cartridges in his firearm, in that, police officer Nunley's firearm was loaded with what is commonly referred to as "jacketed" cartridges, which when fired create a dual hazard, in that, the jacket may separate from the bullet in flight with the result that two prejectiles are present instead of one.

6. Police officer John C. Nunley, did, at, on, or about 1200 hours, December 6, 1976, in the vicinity of Nassau County Police Department Headquarters, Room 254, 1490 Franklin Avenue, Mineola, New York, orally make false official communciations to Deputy Chief Inspector James A. Henderson and

Sergeant Robert G. Ledford, in that, police officer Nunley denied discharging a loaded firearm into a cigarette vending machine on December 5, 1976, between 2000 and 2300 hours, at Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York.

7. Police officer John C. Nunley, did, at, on, or about 1200 hours, December 6, 1976, in the vicinity of Nassau County Police Department Headquarters, Room 254, 1490 Franklin Avenue, Mineola, New York, make and submit a false official statement in writing, in that, police officer Nunley denied discharging a loaded firearm, into a cigarette vending machine on December 5, 1976, between 2000 and 2300 hours, at Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York."

That on or about June 14, 1977, and June 17, 1977, a disciplinary hearing of said charges and specification, was held and on July 6, 1977, petitioner, was found guilty of violating Specifiation Numbers, One, Two, Three, Four, Five, Six and Seven, to wit: Specification Number One violating Article 6, Rules 6, Subdivision 14, Specification Number Two, violating Article 6, Rule 9, Subdivision 14; Specification Number Three violating Article 6, Rules 22, Subdivision A; Specification Number Four violating Article 6, Rule 22, Subdivision B; Specification Number Five violating Article 8, Rules 12; Specification Number Six violating Article 6, Rule 9, Subdivision 12; and Specification Number Seven violating Article 6, Rule 9, Subdivision 12 of the Rules and Regulations, Police Department, County of Nassau, New York and as a result thereof, the petitioner was dismissed from the Police Department, County of Nassau.

On July 15, 1977, a proceeding was brought pursuant to Article 78 of the Civil Practice Law and Rules, of the

State of New York and was transferred for disposition on September 1, 1977, by order of the Hon. Paul Kelly, J.S.C., to the Appellate Division, Second Judicial Department.

REASONS FOR GRANTING THE WRIT

Under the facts and circumstances of this case, the determination and orders made by the Commissioner of Police dismissing the petitioner were unfair, unreasonable, unnecessary, and illegal that petitioner was not afforded a fair hearing because he did not have counsel of his choice, and was in effect, denied the right to testify and represent witnesses in his own behalf.

It is respectfully contended by the petitioner herein that serious errors of law were committed by the Trial Commissioner which precluded petitioner from having a fair hearing. It is submitted that by denying the petitioner a further adjournment in this case, petitioner was denied the right to be represented by counsel of his own choice and that, in effect, he was denied a right to testify and present witnesses in his own behalf.

The courts of New York State have held that the evidence in support of an administrative determination, in the light of the record as a whole, must satisfy a reasonable mind: *Kopec* v. *Buffalo Broke Beam-Acme Steel and Malleable Iron Works*, 304 N.Y. 65; *Phinn* v. *Kross*, 8 App. Div. (2) 132. Also appropriate are the words of Mr. Justice Frankfurter in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S., where he indicated the the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Before the Hearing Officer can effectively determine the guilt or innocence of an individual subjected to an administrative hearing the accused, thus must have an ample opportunity to develop his case. We submit that in the case at bar this was not so.

At this point, a brief history of the chronology of events might be helpful to the Court. Police officer Nunley was arraigned on the aforementioned charges and specifications on January 10, 1977 (see record) and a trial date was set for January 12, 1977. On January 12, a request for an adjournment was made and granted and the matter was set down to March 8, 1977. for a hearing. At that time, police officer Nunley acknowledged compliance with Section 75 of the Civil Service Law in that he consented to suspension without pay after thirty day limit of the statute. On March 8, the case was adjourned to May 2, 1977. On May 2, (p. 6 of transcript hearing that date) it was acknowledged by the Hearing Officer that appellant's attorneys herein, were not the attorneys for police office Nunley in a related, pending criminal matter and that the attorney for that criminal matter was actually engaged. That matter was then put over to May 23.

On May 23, 1977, another adjournment was made because the pending criminal matter had to be heard (p. 3), and at that time the Hearing Officer determined that unless Mr. Nunley was on trial in the criminal case, the hearing would be conducted on June 14, 1977. The respondent's attorney did not object to the adjournment.

On June 14, 1977, a further request was made for an adjournment, and this request was denied and the appellant was forced to proceed to trial. However, on that date, appellant's attorneys now bringing this appeal notified the Hearing Officer that the appellant's attorney from the criminal case wished to make an official appearance

(p. 5) and a request was made by the first attorneys to be substituted by the attorney handling the criminal matter since he was best acquainted with the issues in question (p. 7). In fact, the Hearing Officer was notified that the criminal case was set for June 27, 1977, and that the Court therein had marked the case final against Mr. Nunley (p. 6). At that point, the hearing was begun, under protest (p. 7) but the attorney consented to proceed and represent Mr. Nunley for purposes of hearing the police department's case and then requested a continuance at the close of the respondent's case so that the appellant's criminal attorney could come in and represent Mr. Nunley in his defense (p. 7 and p. 133). The Hearing Officer was notified by the last attorney handling the case, who represented the PBA, that no effort had been made to prepare a defense (p. 10) because they assumed that the other attorney would handle the presentation of the defense. In fact, the PBA attorney notified the Hearing Officer that Mr. Nunley's criminal attorney had directed him not to proceed (p. 149) because it would affect the pending criminal matter. At the close of the department's case, the hearing was continued for three days to June 17, 1977, for the criminal attorney to appear.

On June 17, 1977, a further application for a continuance was made so that the appellant, police officer Nunley could conclude his criminal matter, and then be free to testify in the hearing (p. 154). It was argued that by denying a continuance, the appellant was in effect forced not to testify (p. 155).

The attorney handling the criminal matter also made an appearance on June 17, 1977, and notified the Hearing Examiner that he wished to substitute for the PBA attorney (p. 159) but that he was actually engaged in a criminal matter and could not proceed at that particular point.

He further gave reasons for the delay in the criminal case. He cited the fact that superseding charges had been filed after the initial arraignment, that motions had been made and that the determination on the motions had taken considerable time before finally being rendered and that Mr. Nunley was under a doctor's care and that it took some time for the doctor to complete his medical examination. The criminal attorney further explained (p. 161) that because of the pending criminal case, he could not permit his client to testify because anything that he testified to in the hearing could be used against him in the criminal case and that the police department could not grant Mr. Nunley immunity for testifying at the Police Disciplinary Hearing.

Nevertheless, the Hearing Examiner directed the PBA attorney to proceed and the hearing was further conducted under protest (p. 165). It was then explained that there were three witnesses that were to be called (p. 168 and p. 169) but because another attorney was handling the case, these witnesses had not been contacted and were thus not available. Explanations were made on the record once again that officer Nunley would not testify and that his defense did not rest but was forced to conclude (p. 183). The hearing was thus closed.

The appellant thus contends that any deprivation of the right to counsel and thus to a fair trial, in itself, is a basis for annulment of a determination resulting therefrom. *Romeo* v. *Union Free School District No. 3, Town of Islip,* 368 N.Y.S. 2nd 726. The right to have the assistance of counsel is to fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *Glazer* v. *U.S.,* 315 U.S. 60.

It is well settled, therefore, that an individual has a right to the counsel of his own choice, *People* v. *Price,*

262 N.Y. 410, and that this right to counsel applies to disciplinary proceedings as well as to criminal actions, *Fusco* v. *Moses,* 304 N.Y. 402. That case further raised the issue that a question to be determined in an Article 78 proceeding is "whether, in making a determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner". The appellant contends that the denial of this right of counsel and denial of further adjournment, had denied Mr. Nunley the right to fair hearing. "The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." (*Hecht* v. *Monaghan,* 307 N.Y. 461, 470, 121 N.E. 2nd 421, 425). It should be borne in mind by Hearing Examiners in governmental agencies that they are acting in quasi-judicial capacities; that there is imposed upon them an obligation to afford all who come before them a fair opportunity to be prepared to meet the issues and to produce witnesses on their own behalf. This constitutional right must not be circumvented. *O'Dea's Bar & Rest., Inc.* v. *New York State Liq. Auth.,* cite as 201 N.Y. S. 2d 340 at 343.

Therefore, the necessity of delegating judicial functions of government to administrative bodies cannot be allowed to overcome the most basic rights afforded to individual citizens including the right to a full and fair hearing. *Louis Irwin* v. *Board of Regents,* 279 N.Y.S. 2d 69 (1967) at 72.

POINT II

The punishment imposed is so disproportionate to the offense, in light of all the circumstances, so as to be shoking to one's sense of fairness.

It is respectfully submitted by petitioner that even if this Court determines that respondent was correct in finding petitioner guilty, the punishment was excessive, arbitrary, and capricious, predetermined and should therefore be overturned.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

RICHARD HARTMAN
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Mineola, New York 11501

Of Counsel:

MICHAEL C. AXELROD

[APPENDIX FOLLOWS]

APPENDIX

Opinion and Order of the Supreme Court of the State of New York Appellate Division Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 3, 1978

HON. HENRY J. LATHAM,
Justice Presiding,
HON. VINCENT D. DAMIANI,
HON. JOSEPH F. HAWKINS,
HON. FRANK D. O'CONNOR,
Associate Justices.

In the Matter

of

JOHN C. NUNLEY,

Petitioner,

v.

DANIEL GUIDO, Commissioner of Police of the County of Nassau,

Respondent.

The above named John C. Nunley, petitioner, having instituted this proceeding pursuant to CPLR article 78,

Opinion and Order of the Supreme Court of the State of New York Appellate Division Second Department

by a petition verified July 15, 1977, to review respondent's determination, dated July 6, 1977, which, after a hearing, adjudged petitioner guilty of certain charges of misconduct and dismissed him from his position as a police officer; the respondent having filed an answer thereto; by order of the Supreme Court, Nassau County, dated September 29, 1977, the proceeding was transferred to this court for determination; and the proceeding having been submitted by Messrs. Hartman, Morganstern & Lerner, Esqs., of counsel for the petitioner and submitted by Natale C. Tedone, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the determination is hereby confirmed and the proceeding dismissed on the merits, without costs or disbursements.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Order of the Court of Appeals of the State of New York Denying Motion for Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

At at session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June A. D. 1978

Present:

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

2 Mo. No. 477

In the Matter of the

Application of JOHN C. NUNLEY,

Appellant,

For an Order &c.,

vs.

DANIEL GUIDO, Commissioner of Police of the County of Nassau,

Respondent,

Review the determination of the Respondent in dismissing the Petitioner &c.

Order of the Court of Appeals of the State of New York Denying Motion for Leave to Appeal

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-206

JOHN C. NUNLEY,

Petitioner,

—against—

DANIEL GUIDO, Commissioner of Police
of the County of Nassau,

Respondent,

Reviewing the Determination of the Respondent
in Dismissing Petitioner, JOHN C. NUNLEY,
from the Police Department, County of Nassau.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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CITATIONS

IN THE

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OCTOBER TERM, 1978

No. 78-206

JOHN C. NUNLEY,

Petitioner,

—against—

DANIEL GUIDO, Commissioner of Police of the County of Nassau,

Respondent,

Reviewing the Determination of the Respondent in Dismissing Petitioner, JOHN C. NUNLEY, from the Police Department, County of Nassau.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

Opinions Below

The opinion of the New York State Supreme Court, Appellate Division, Second Department, confirming respondent's determination, is reported at —— A.D. 2d ——, 403 N.Y.S. 2d 301 (2nd Dept. 1978). Leave to appeal to the New York State Court of Appeals was denied on June 8, 1978 (see order denying leave, attached hereto, A. 4).*

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* (A.) indicates appendix attached to respondent's brief.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S. Code Section 1257.

Questions Presented

1. Whether petitioner's Sixth Amendment or due process rights under the Federal Constitution were violated in the disciplinary hearing which terminated petitioner from the Nassau County Police Department?
2. Whether petitioner's right of an opportunity to defend himself was violated?
3. Whether the punishment imposed in light of the circumstances of this case was so disproportionate to the offense so as to be shocking to one's sense of fairness?

Constitutional Provisions and Statutes Involved

This case allegedly involves the Sixth Amendment to the United States Constitution and Article V, Section 75 of the New York State Civil Service Law.

Statement

Petitioner was appointed a patrolman with the Police Department of the County of Nassau, State of New York, on the 14th day of January, 1972.

Petitioner was served with Nassau County Police Department Charges and Specifications on January 10, 1977. See petitioner's brief, pp. 3-5 for the specific charges and specifications.

On January 10, 1977, petitioner appeared before Inspector Richard D. Wolbern, a Trial Commissioner duly appointed by the respondent, and petitioner was apprised of the charges and specifications against him. Trial was set for January 12, 1977.

On January 12, 1977, petitioner requested that the disciplinary trial be adjourned to March 8, 1977. This request was granted. On March 8, 1977, another request was made by petitioner, seeking an adjournment to May 2, 1977. Again the request was granted. On May 2, 1977, petitioner requested that the disciplinary trial be adjourned to May 23, 1977. Petitioner was advised that there would be no further adjournments of the disciplinary trial unless and in fact the criminal trial was actually in session and continuing. Up until this point, respondent cooperated with petitioner regarding adjournments so that pending criminal charges against appellant might be resolved.

The Trial Commissioner stated (T. 7)* (May 2, 1977, hearing):

> "In the past, it has been represented to me that an adjournment was necessary in this proceeding because of the criminal trial. I think the record will indicate that they have come in here and asked for an adjournment and then asked for an adjournment there, and we would like to get this trial going, so that is the reason we have no further adjournment according to these conditions."

Petitioner's counsel agreed on May 2, 1977 that no further adjournment will be granted unless the criminal action

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* (T.) indicates the Transcript of the Proceeding, unless otherwise indicated.

involving the petitioner was actually in session. (T. 8, May 2, 1977).

On May 23, 1977 (T. 3), petitioner at the Disciplinary Hearing made a further request for an adjournment to June 14, 1977, and despite the admonition given to petitioner by the Trial Commissioner on May 2, 1977, the disciplinary trial was further adjourned to June 14, 1977.

On June 14, 1977, petitioner, through his attorney, at the instant disciplinary hearing for the first time indicated his desire to have the attorney who was representing him in the criminal trial represent him in the disciplinary trial, and requested a further adjournment (T. 5, June 14, 1977, hearing).

Due to a delay of approximately twenty weeks and an attempt at the last moment to change attorneys and thereby obtain a further adjournment, the request was properly denied by the Trial Commissioner. (T. 6 June 14, 1977 hearing.)

The hearing was commenced on June 14, 1977 before said Trial Commissioner, Inspector Richard D. Wolbern, and was held in accordance with the provisions of section 8-13.0(c) of the Nassau County Administrative Code and Article 9 of the Rules and Regulations of the Nassau County Police Department. At the close of the Department's case, the hearing was continued for three days to June 17, 1977, to permit petitioner's criminal attorney to appear.

On June 17, 1977, petitioner's request for a further continuance was denied by said Trial Commissioner, and appellant was directed to proceed. The hearing was conducted under petitioner's attorney's protest, and was concluded on June 17, 1977 (T. 164-165, June 11, 1977).

The Trial Commissioner after the conclusion of the hearing reserved decision (T. 184 June 17, 1977 hearing). Thereafter the said Trial Commissioner found petitioner guilty of all seven of the above mentioned specifications (A. 5-9) and submitted his determinations and recommendations to respondent for review.

After a review of the Charges and Specifications, the transcripts of the disciplinary hearing and the exhibits received in evidence at the disciplinary hearing, respondent, in the exercise of his authority as Police Commissioner of the Nassau County Police Department, adopted and approved the determinations and recommendations made by the Trial Commissioner (A. 10-12) which dismissed petitioner from the Nassau County Department.

On July 15, 1977, petitioner instituted a proceeding pursuant to Article 78 of the New York State Civil Practice Law and Rules. The aforementioned Article 78 proceeding was transferred for disposition on September 1, 1977, by order of the Honorable Paul Kelly, Justice of the Supreme Court, Nassau County, to the New York State Appellate Division, Second Judicial Department.

On April 3, 1978, the New York State Appellate Division, Second Department, in *Nunley* v. *Guido*, —— A.D. 2d ——, 403 N.Y.S. 2d 301 (2nd Dept. 1978), confirmed respondent's determination and dismissed the proceeding on the merits, without costs or disbursements.

On June 8, 1978, the Court of Appeals, State of New York, denied petitioner's motion for leave to appeal to the Court of Appeals. (Decision is annexed hereto.) (A-3).

The criminal proceeding, in which petitioner was charged with criminal violations arising out of his actions at Mother's Pub and which led to the disciplinary hearing in question, was held on September 12, 1977. At that time,

petitioner pleaded guilty to one count of disorderly conduct. The Honorable Henry S. Kalinowski, Nassau County District Court Judge, then sentenced petitioner to a conditional discharge, with restitution for the damage done to the cigarette machine. (A. 14-23). A copy of the criminal disposition of September 12, 1977, the information filed against the petition, and the supporting deposition of George Stamitis (manager of Mother's Pub) was submitted to the New York State Appellate Division, Second Department and to petitioner's counsel on March 15, 1978 (A. 13) for review by that appellate court upon its consideration of the disciplinary proceeding in *Nunley* v. *Guido,* —— A.D.2d ——, 403 N.Y.S.2d 301 (2nd Dept. 1978).

ARGUMENT

Petitioner Failed to Demonstrate a Deprivation of Any Constitutional Rights Under the Sixth Amendment or Due Process at the Disciplinary Hearing and Confirmation of Respondent's Determination Was Correct as a Matter of Law.

It is contended by the petitioner that by being denied a further adjournment in this case, petitioner was denied his right to be represented by counsel of his choice. Petitioner also alleges that the denial of his request for an additional adjournment has in effect precluded him from testifying and presenting witnesses in his own behalf.

It is clear that at no point during the disciplinary hearing was the petitioner without competent counsel of his choice. Furthermore, that counsel who represented the petitioner during the disciplinary hearing and the subsequent state appeals is the same counsel who is now representing the petitioner in his petition for writ of certiorari

to this Court. Finally, it should be noted that there has been four adjournments requested by petitioner and granted by the trial commissioner covering a period of some twenty weeks before the disciplinary hearing was held.

Section 75 of the Civil Service Law of New York State (A. 24-26) mandates that at a disciplinary hearing, the public employee may be represented by counsel. This requirement has been complied with by the fact that at all stages of the disciplinary hearing and during the twenty week adjournment period, petitioner was accompanied and represented by competent counsel.

As to petitioner's right to testify and present witnesses on his own behalf, the Trial Commissioner, at the May 2, 1977 hearing (T. 7) adverted to the fact that there has already been three previous adjournments requested by petitioner which were granted but that no further adjournments would be granted unless the criminal trial involving the petitioner was actually in session. Therefore, the petitioner and his attorney had from January 12, 1977 (granting of first adjournment) to June 17, 1977 to prepare a defense and contact the necessary witnesses. Yet after four adjournments, all of which were at petitioner's request, and after twenty weeks had passed since the date when the disciplinary hearing was originally scheduled, petitioner contended that several of the witnesses who were going to testify on petitioner's behalf were not available (T. 161, June 17, 1977). It is therefore clear that petitioner, given ample opportunity to prepare his defense under the supervision of competent legal counsel of his own choice, and having requested numerous adjournments which were granted, cannot now complain that his constitutional rights were violated or infringed upon.

Finally, as to the punishment imposed upon the petitioner by the respondent, it is respectfully submitted that

in light of the seriousness of the offense and petitioner's past misconduct, the penalty imposed was not shocking to one's sense of fairness.

I.

The Decision Below Is Clearly Correct.

The fundamental rule is that any deprivation of the right to counsel and to a fair trial is a basis for nullification of a determination which results therefrom. *Matter of Fusco* v. *Moses,* 304 N.Y. 424 (1952). Respondents agree that the right to have counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *Glasser* v. *U.S.,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1941). This rule of right to counsel has been applied to disciplinary hearings as well as criminal actions because of due process fair child trial considerations. *Matter of Fusco* v. *Moses, supra.*

However, while a petitioner at the disciplinary hearing has a right to be represented by counsel, a petitioner does not have an absolute right to representation by counsel of his own choice. *Matter of Manzi* v. *Kaplan,* 35 Misc. 2d 793, 231 N.Y.S. 2d 161 (Sup. Ct., Queens Co., 1962), aff'd 20 A.D. 2d 791, 248 N.Y.S. 2d 390 (2nd Dept. 1964); *In the Matter of Cullinan and Meyer* v. *Frank,* Sup. Ct., Nassau County, Index No. 4918/71, decided July 15, 1971, (Pittoni, J.), N.O.R., copy of decision annexed hereto in appendix at A1-3, aff'd —— A.D. 2d ——, 336 N.Y.S. 2d 239 (2nd Dept. 1972), rehearing denied, 46 A.D. 2d 738, 361 N.Y.S. 2d 1010 (2nd Dept. 1974). While the Sixth Amendment of the United States Constitution mandates that a defendant be represented by counsel at a criminal proceeding, the defendant does not have an absolute right to representation by counsel of his own personal choice. *U.S. ex Rel.*

Baskerville v. *Deegan,* 428 F. 2d 714 (2nd Cir. 1970), cert. den. 400 U.S. 928, 91 S. Ct. 193, 27 L. Ed. 2d 188 (1970); *U.S. ex Rel. Carey* v. *Rundle,* 409 F. 2d 714 (3rd Cir. 1969), cert. den. 397 U.S. 946, 90 S. Ct. 964, 25 L. Ed. 2d 127 (1970). Therefore, petitioner cannot ask for an adjournment of the disciplinary hearing so that he can be represented by counsel of his own choice where the request is invoked merely to delay the hearing. *In the Matter of Cullinan and Meyer* v. *Frank, supra; Matter of Romeo* v. *Union Free School District No. 3, Town of Islip,* 82 Misc. 2d 336, 368 N.Y.S. 2d 927 (Sup. Ct., Suffolk Co., 1975), reversed —— A.D. 2d ——, New York Law Journal, p. 13, col. 2, 3, 4, July 26, 1978; *Freight Consolidators Cooperative, Inc.* v. *U.S.,* 230 F. Supp. 692 (S.D.N.Y. 1964).

In the instant case, petitioner was represented by competent counsel throughout the disciplinary hearing. After three adjournments had been granted at petitioner's request due to the pending criminal trial, thus delaying the disciplinary hearing for twenty weeks, petitioner was informed at the May 2, 1977 hearing (T. 6, May 2, 1977) that no further adjournment would be granted unless the criminal trial involving petitioner was actually in session. The Trial Commissioner based his decision not to grant a further adjournment on the fact that past adjournments which were requested by the petitioner and granted had delayed holding the disciplinary hearing for a period in excess of 20 weeks. It was revealed for the first time on June 14, 1977 (T. 7, June 14, 1977) that petitioner's attorney at his pending criminal trial, John Lewis, has consented to come in and try the disciplinary hearing. The Trial Commissioner, after indicating that this proceeding has been delayed for over twenty weeks due to petitioner's constant request for adjournments which had been granted in the past, ordered the respondent to proceed with its case

on June 14, 1977. At the conclusion of respondent's presentation, an adjournment was ordered until June 17, 1977. On June 17, 1977, John Lewis, (petitioner's criminal attorney) appeared at the disciplinary hearing for the first time and stated that he was not representing the petitioner at this time at the disciplinary hearing (T. 158, June 17, 1977).

Based on the sequence of events stated above, there can be no doubt that petitioner's request for a further adjournment at the June 14, 1977, hearing was nothing more than an attempt to further delay the disciplinary hearing, and thus the denial of petitioner's request for an adjournment was proper as a matter of law. *Matter of Romeo* v. *Union Free School Dist. No. 3, Town of Islip, supra; In the Matter of Cullinan and Meyer* v. *Frank, supra.*

At no point was petitioner denied the right to testify on his own behalf. Petitioner pleaded not guilty to all the charges and specifications, and had a full opportunity to testify accordingly. Instead, he chose to stand mute. The fact that criminal charges against petitioner were pending did not prevent petitioner from testifying on his own behalf, in accordance with his plea of not guilty at the departmental hearing.

Garrity v. *New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 77 L.Ed.2d 562 (1967); *Gardner* v. *Broderick,* 392 U.S. 273, 88 S.Ct. 1973, 20 L.Ed2d 1082 (1968); *Uniformed Sanitation Men Association* v. *Commissioner,* 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968), stand for the proposition that the Fourteenth Amendment prohibits the use of statements obtained at a disciplinary hearing in subsequent criminal proceedings. Since whatever petitioner would have testified to at the disciplinary hearing would not have been admissible at the subsequent criminal proceeding, petitioner's decision not to testify at the hearing was not due to the denial of his request for a further adjournment.

Nor was petitioner denied the right to present witnesses in his own behalf by any reason other than his own failure to show diligence in procuring the attendance of such witnesses at the hearing. Petitioner had been granted four adjournments, which delayed the disciplinary hearing for twenty weeks. Furthermore, petitioner knew as of May 23, 1977, that no further adjournment would be granted unless the pending criminal action was actually in session. Yet petitioner did not use the time given by the adjournments to prepare his defense or contact his witnesses.

Finally, in light of the severity of the offense and the prior instances of misconduct on the part of appellant, the penalty imposed was not shocking to one's sense of fairness.

The responsibility for maintaining discipline in the Nassau County Police Department is vested in the Commissioner of Police pursuant to section 8-13.0 of the Nassau County Administrative Code. (A 27-28) This section prescribes a variety of sanctions ranging from reprimand to dismissal. When disciplining a police officer, the Commissioner must consider the destructive impact such conduct tends to have on the confidence which is so important for the public to have in the police officers.

If, in the exercise of his considered judgment, the Police Commisisoner imposes punishment, the exercise of his reasonable discretion should not be disturbed unless the punishment is so disproportionate to the offense as to be shocking to one's sense of fairness. *Matter of Pell* v. *Board of Education,* 34 N.Y.2d 222 (1974); *Matter of Alfieri* v. *Murphy,* 38 N.Y.2d 976 (1975); *Matter of O'Connor* v. *Frank,* 38 N.Y.2d 963 (1975).

The transcripts of the disciplinary hearings and the exhibits received in evidence support respondent's determination. At the July 14, 1978, hearing, George Stamatis, manager of Mother's East Side Pub, testified that petitioner offered to pay for the damages to the cigarette machine (T. 19) and that petitioner discharged a revolver in the cigarette machine (T. 20-21). Police Officer Safchuk also testified that petitioner discharged his revolver without just cause at Mother's East Side Pub. (T. 78) It has been held that a Commissioner of Police may take a police officer's prior history in the department into account in determining the punishment to be imposed. *Matter of Slominski* v. *Codd,* 52 A.D.2d 762 (1st Dept. 1976), *aff'd,* 41 N.Y.2d 1086 (1977); *Joshua* v. *McGrath,* 35 N.Y.2d 886 (1974).

In deciding whether the penalty imposed upon the petitioner was shocking to one's sense of fairness, it is necessary to examine the police officer's role in society. In the *Matter of Steward* v. *Leary,* 57 Misc.2d 792, at 793, 293 N.Y.S.2d 573, at 574 (Sup.Ct. New York Co. 1968), the Court defined a police officer's role in society as:

> "A police officer plays a unique role in society. He is the guardian of the public safety and is set up as a model to be emulated. He must at all times be free to exercise his judgment in performing his duties and can never act in a manner which would tend to destroy the public's confidence in his integrity. Not only his official conduct, but the manner in which he conducts himself while not on duty reflects upon his integrity and upon his ability to perform his duties."

Given petitioner's personnel file, which includes prior charges and convictions against petitioner, *Matter of Stoecker and Nunley* v. *Guido,* —— A.D.2d ——, 406 N.Y.S.2d

706 (2d Dept. 1978); and of a judgment against the County due to petitioner's actions in *Laskowski* v. *County of Nassau,* 57 A.D.2d 888, 394 N.Y.S.2d 442 (2d Dept. 1977), it is clear that the punishment imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness. In *Laskowski* v. *County of Nassau, supra,* Police Officer Nunley, while attending a bachelor party in the vicinity where the Laskowski premises were located, engaged in an altercation with Mr. Laskowski, during which altercation Officer Nunley allegedly threw Mr. Laskowski through a plate glass window. In *Matter of Stoecker and Nunley* v. *Guido, supra,* Officer Nunley was charged with violating Article 17, Rule 1, of the Rules and Regulations of the Nassau County Police Department in that Officer Nunley effected an unlawful arrest on the grounds of obstructing governmental administration without reasonable cause to believe such offense had been committed.

In the instant case, Police Officer Nunley has been charged with violating six police regulations (see Petitioner's Brief, pp. 3-5), and was charged with four criminal violations (A. 14) arising out of petitioner's discharging of his revolver into a cigarette machine at Mother's Pub while off duty. On September 12, 1977, petitioner pleaded guilty to one count of disorderly conduct and was given a conditional discharge with restitution for damage caused to the cigarette machine.

In sum, it is clear that petitioner has failed to demonstrate a deprivation of any constitutional rights under the Sixth Amendment or due process at the Disciplinary Hearing, and therefore confirmation of respondent's determination by the New York State Appellate Division, Second Department was lawful and proper.

II.

There Is No Conflict of Decision.

Petitioner cites *People* v. *Price*, 262 N.Y. 410 (1933), and *Matter of Fusco* v. *Moses, supra,* for the proposition that an individual has a right to the counsel of his own choice in both disciplinary and criminal actions. However, the courts have extended this proposition one step further by holding that the petitioner's right to be represented by counsel of his own choice is not an absolute right and cannot be insisted upon where the purpose is to delay the administrative proceeding. Matter of *Manzi* v. *Kaplan, supra; In the Matter of Cullinan and Meyers* v. *Frank, supra; Matter of Romeo* v. *Union Free School District No. 3, Town of Islip, supra.* As was pointed out, petitioner was granted four adjournments which delayed the disciplinary hearing for over twenty weeks. Furthermore, petitioner did not indicate that his attorney at the pending criminal action would represent him at the disciplinary hearing until the eve of disciplinary hearing of June 14, 1977 (T. 7-June 14, 1978). Finally, when John Lewis, petitioner's attorney in the pending criminal action, appeared at the June 17, 1977, hearing, he stated that he was not presently representing the petitioner for purposes of the disciplinary hearing (T. 158). Therefore, it is clear that petitioner's request for a further adjournment on June 14, 1977, was for the sole purpose of delaying the administrative hearing and hence the trial commissioner's denial of petitioner's request for an adjournment at the time in question was proper.

III.

There Is No Substantial Question of Constitutional Dimension.

Clearly, the attempt by petitioner to cloak his petition in terms of a violation of the Sixth Amendment of the United States Constitution is without foundation. The Sixth Amendment of the Federal Constitution applies to criminal prosecutions. It has been held that a disciplinary hearing is not a criminal prosecution. *Matter of Delehanty,* 202 Misc. 33, at 38, (Sup.Ct. New York Co. 1952), *aff'd,* 280 App.Div. 542, *aff'd,* 304 N.Y. 725 (1952).

It is also apparent that the Sixth Amendment contained in the Federal Constitution does not bind the states nor act as a limitation on them. (Hyatt on Trials, §§351, 353) *Carlisle* v. *County of Nassau,* —— A.D.2d ——, (2d Dept. 1978) decided August 14, 1978.

Turning to the due process issue, although petitioner did not allege a due process violation per se, it appears that petitioner's argument is grounded on a due process violation. It is submitted that there is no merit to a due process argument under the facts and circumstances herein.

Respondent contends that since there is no absolute right for petitioner to be represented by counsel of his own choice, and since petitioner's insistence of this right would result in delaying the administrative hearing, it is clear that there is no substantial question of constitutional dimension within the parameters of constitutional due process.

Respondent further contends that the denial of petitioner's request for a further adjournment of the disciplinary hearing on June 14, 1977, did not compel the petitioner to

refrain from testifying if he chose to, since anything petitioner testified to at the hearing could not be used against him in the pending criminal case. It also must be noted that petitioner had ample opportunity to contact any witnesses who were going to testify on his behalf and have them present for the June 14th and June 17th hearings.

Finally, respondent contends that petitioner does not challenge the penalty imposed on constitutional grounds and that given the circumstances of this case, said punishment was not so disproportionate to the offense as to be shocking to one's sense of fairness.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD G. MCCABE
County Attorney of Nassau County
Attorney for Respondent
Nassau County Executive Building
Mineola, New York 11501
(516) 535-4406

WILLIAM S. NORDEN
Bureau Chief,
Bureau of Law & Appeals,

Of Counsel.

ANDREW KRESS,
Law Intern,

On the Brief.

APPENDIX

APPENDIX

Memorandum Decision by Mr. Justice Pittoni

SUPREME COURT—NASSAU COUNTY

SPECIAL TERM—PART I

Index No. 4918/71—Cal. No. 71-7/13/71

BY PITTONI, J.

DATED JULY 15, 1971

In the Matter of

ROBERT J. CULLINAN and WALTER J. MEYER,

Petitioners,

Reviewing the determination of the Respondent which dismissed Petitioners from their positions as Patrolmen and Detectives and directing their reinstatement and for a new hearing

vs.

LOUIS J. FRANK, COMMISSIONER OF POLICE and INSPECTOR CHRISTOPHER QUINN, TRIAL COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU,

Respondents.

BRACKEN & SUTTER, ESQS.
Attorneys for Petitioners
50 Mineola Boulevard
Mineola, New York 11501

HON. JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Respondents
Nassau County Executive Building
Mineola, New York 11501

Memorandum Decision by Justice Pittoni

In this proceeding pursuant to Article 78 of the CPLR judgment is granted in favor of respondents *dismissing* the petition.

Petitioners were members of the Police Department of the County of Nassau. On June 25, 1970, they were indicted by the grand jury of Nassau County and charged with "an attempt to commit the crime of Grand Larceny in the First Degree." On July 2, 1970, written departmental charges were prepared, charging petitioners with violating Article IX, Rules 10 and 11 of the Rules and Regulations, Police Department, County of Nassau—conduct unbecoming an officer and prejudicial to the good order and efficiency of the Police Department. A departmental hearing was scheduled for November 30, 1970, and adjourned, at the request of petitioners, to January 6, January 27, February 24, April 8, and April 22, 1971. Each adjournment was based on the ground that petitioners' attorney, John J. Sutter, Esq., of the firm of Bracken & Sutter, was actually engaged in other trials. On April 22, 1971, the Trial Commissioner, respondent Inspector Christopher Quinn, refused to grant another adjournment requested by James Moffit, Esq., on behalf of John Sutter, Esq. The hearing proceeded with petitioners remaining mute at the direction of attorney Moffitt. An opportunity was afforded petitioners to cross-examine the witnesses produced to support the charges. After many pages of testimony, the hearing was adjourned until April 27, 1971, with Inspector Quinn advising petitioners that they could appear on that date, present witnesses, offer any evidence that they wished and, if desired, the witnesses heard on April 22 would be subpoenaed to attend on April 27. On the last date, April 27, petitioners were present without counsel, stated that they were advised by Mr. Sutter to

Memorandum Decision by Justice Pittoni

be mute, and did not participate in the brief hearing that followed.

Petitioners contend that respondents deprived them of a fundamental right to be represented by counsel of their own choosing and to confront and cross-examine witnesses, and they pray for an annulment of a decision made on June 4, 1971, dismissing them as Patrolmen in the Police Department.

The Civil Service Law, Section 75, subd. 2, does provide that "The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf." A recent case, *Matter of Sowa* v. *Looney* (23 N Y 2d 329), provides in part (p. 333) ". . . no essential element of a fair trial can be dispensed with unless waived without rendering the administrative determination subject to reversal upon review." Examination of the minutes reveals that Inspector Quinn offered petitioners many opportunities prior to April 22 to be represented by counsel of their choosing and advised petitioners on several of the adjournments that if Mr. Sutter were not available on the adjourned date other counsel should be obtained to represent them. There comes a point at which a hearing may no longer be deferred because one particular attorney is not available. That point was reached in this matter. Ample opportunity was given petitioners to engage other counsel or to be represented by other members of the firm of Bracken & Sutter. They chose not to avail themselves of the opportunity. It may not be held that the respondent Quinn was arbitrary or unreasonable in directing the hearing to proceed.

Submit judgment on notice.

MARIO PITTONI
J.S.C.

Motion for Leave to Appeal to Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June A.D. 1978

PRESENT,

HON. CHARLES D. BREITEL,

Chief Judge, presiding.

Mo. No. 477

In the Matter of

the Application of JOHN C. NUNLEY,

Appellant,

For an Order &c.,

vs.

DANIEL GUIDO, Commissioner of Police of the County of Nassau,

Respondent,

Review the determination of the Respondent in dismissing the Petitioner &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been

Motion for Leave to Appeal to Court of Appeals

submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Trial Commissioner Decision

POLICE DEPARTMENT—COUNTY OF NASSAU

Case Number 4512

Trial Commissioner Inspector Richard D. Wolbern

IN THE MATTER OF CHARGES

—against—

POLICE OFFICER JOHN C. NUNLEY

Charges of Violating Article 6, Rule 9, Subdivision 14; Article 6, Rule 9, Subdivision 14; Article 6, Rule 22, Subdivision a; Article 6, Rule 22, Subdivision b; Article 8, Rule 12; Article 6, Rule 9, Subdivision 12; Article 6, Rule 9, Sub. 12, of the Rules and Regulations of the Police Department, County of Nassau, New York, having been made to the Commissioner of Police, Police Department, County of Nassau, New York, against Police Officer John C. Nunley, Shield Number 1271, Eighth Precinct, dated January 6, 1977 by Deputy Chief Inspector James A. Henderson, Deputy Commanding Officer of Internal Affairs Unit, and said charges having been served on John C. Nunley on January 6, 1977, and said John C. Nunley having appeared before the Trial Commissioner, Inspector William T. Hildebrand, on January 10, 1977 and having been informed by the Trial Commissioner of his legal rights and having thereupon entered a plea of "Not Guilty" to all specifications, a trial of said John C. Nunley was subsequently held on said Charges and Specifications on June 14, and June 17, 1977 before the undersigned,

Trial Commissioner Decision

Inspector Richard D. Wolbern, who was duly designated Trial Commissioner by order of the Commissioner of Police dated April 9, 1976, and said John C. Nunley having been represented by his attorney, Michael Axelrod Esq., and complainant having been represented by William Gitelman, County Attorney of Nassau County; Louis Schultz Esq., Senior Deputy County Attorney, of Counsel, and after hearing the proof and evidence of the parties, Inspector Richard D. Wolbern hereby determines and recommends:

DETERMINATIONS

Specification Number 1.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, engage in unlawful conduct, in that, Police Officer Nunley did, without justification, fire a loaded gun at a cigarette machine, thereby recklessly endangering other people who were present in and about Mother's East Side Pub.

THIS IN VIOLATION OF ARTICLE 6, RULE 9, SUBDIVISION 14 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK

Specification Number 2.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, engage in unlawful conduct, in that, Police Officer Nunley, having no legal right to do so, nor any

reasonable ground to believe he had such right, intentionally damaged the property of another person when he discharged a loaded firearm into a cigarette vending machine.

THIS IS IN VIOLATION OF ARTICLE 6, RULE 9, SUBDIVISION 14 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK

Specification Number 3.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, fail to exercise the utmost care in the handling of a firearm, in that, Police Officer Nunley unjustifiably displayed a loaded firearm in a tavern with others present and discharged said loaded firearm into a cigarette vending machine.

THIS IS IN VIOLATION OF ARTICLE 6, RULE 22, SUBDIVISION a OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK

Specification Number 4.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, while not lawfully hunting or target shooting, fail to report as soon as practicable to the Commissioner of Police, through official channels, that he had discharged two shots from a loaded firearm into a cigarette vending machine while present at a bar in Bethpage.

THIS IS IN VIOLATION OF ARTICLE 6, RULE 22, SUBDIVISION b OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Specification Number 5.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, while off duty and not in uniform, fail to carry .38 special caliber Departmental issue cartridges in his firearm, in that, Police Officer Nunley's firearm was loaded with what is commonly referred to as "jacketed" cartridges, which when fired create a dual hazard, in that, the jacket may separate from the bullet in flight with the result that two projectiles are present instead of one.

THIS IS IN VIOLATION OF ARTICLE 8, RULE 12 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Specification Number 6.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, at, on, or about 1200 hours, December 6, 1976, in the vicinity of Nassau County Police Department Headquarters, Room 254, 1490 Franklin Avenue, Mineola, New York, orally make false official communications to Deputy Chief Inspector James A. Henderson and Sergeant Robert G. Ledford, in that, Police Officer Nunley denied discharging a loaded firearm into a cigarette vending machine on December 5, 1976, between 2000 and 2300 hours, at Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York.

Trial Commissioner Decision

THIS IS IN VIOLATION OF ARTICLE 6, SUBDIVISION 12 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Specification Number 7.: Substantial evidence was presented at the trial to prove that Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, did, at, on, or about 1200 hours, December 6, 1976, in the vicinity of Nassau County Police Department Headquarters Room 254, 1490 Franklin Avenue, Mineola, New York, make and submit a false official statement in writing, in that, Police Officer Nunley denied discharging a loaded firearm into a cigarette vending machine on December 5, 1976, between 2000 and 2300 hours, at Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York.

THIS IS IN VIOLATION OF ARTICLE 6, SUB. 12 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

RECOMMENDATION

After careful consideration of the testimony, proof and evidence in this case, it is recommended to the Commissioner of Police of the Police Department, County of Nassau, New York that Police Officer John C. Nunley be found guilty of Specifications 1, 2, 3, 4, 5, 6 and 7 as charged and that the Commissioner of Police impose such disciplinary action as he shall deem fit and proper.

/s/ RICHARD D. WOLBERN
Richard D. Wolbern
Inspector
Trial Commissioner

Dated at Police Headquarters
Mineola, New York
July 5, 1977

Police Commissioner Decision and Order

POLICE DEPARTMENT

COUNTY OF NASSAU

Case Number 4512

IN THE MATTER OF CHARGES

—against—

POLICE OFFICER JOHN C. NUNLEY

Charges of Violating Article 6, Rule 9, Subdivision 14; Article 6, Rule 9, Subdivision 14; Article 6, Rule 22, Subdivision a; Article 6, Rule 22, Subdivision b; Article 8, Rule 12; Article 6, Rule 9, Subdivision 12; Article 6, Rule 9, Sub. 12 of the Rules and Regulations of the Police Department, County of Nassau, New York having been made to the Commissioner of Police, Police Department, County of Nassau, New York, against Police Officer John C. Nunley, Shield Number 1271, 8th Precinct, dated January 6, 1977 by Deputy Chief Inspector James A. Henderson, Deputy Commanding Officer, Internal Affairs Unit, and said charges having been served on John C. Nunley on the 6th day of January, 1977, and said John C. Nunley having appeared before Trial Commissioner Inspector William T. Hildebrand on January 10, 1977 and having been informed by the Trial Commissioner of his legal rights and having thereupon entered a plea of "Not Guilty" to all specifications, a trial of said John C. Nunley was held on said Charges and Specifications on June 14, 1977 and June 17, 1977 before Inspector Richard D. Wolbern, who

was duly designated Trial Commissioner by order of the Commissioner of Police dated April 9, 1976 and said John C. Nunley, having been represented by his attorney, Michael Axelrod Esq. and Inspector Richard D. Wolbern, Trial Commissioner having heard the pleadings and the proof and evidence of the parties, and having filed with Daniel P. Guido, Commissioner of Police, his determinations and recommendations dated July 5, 1977, and the said Daniel P. Guido, Commissioner of Police of the Police Department, County of Nassau, New York, having reviewed the said charges against John C. Nunley, the evidence as contained in the record of the trial and the determinations and recommendations of Inspector Richard D. Wolbern, Trial Commissioner, it is

ORDERED, that the Commissioner of Police of the Police Department, County of Nassau, New York, does hereby approved and confirm the determinations and recommendations of the Trial Commissioner and finds Police Officer John C. Nunley guilty of Specifications Numbers 1, 2, 3, 4, 5, 6 and 7 as charged. And it further appearing from the personnel record of said Police Officer John C. Nunley that he was previously convicted of 4 charges and specifications, to wit:

Date	*Charge*	*Disposition*
March 27, 1972	Left place of confinement while on sick leave	Fined 1 days' pay
March 28, 1972	Made false statement to a superior officer	Fined 3 days' pay

Date	*Charge*	*Disposition*
September 4, 1972	Engaged in a verbal argument with a superior officer in the presence of other persons	Fined 2 days' pay
May 27, 1975	Effected an arrest for obstructing governmental administration without probable cause	Fined 5 days' pay

In addition to the foregoing which is believed to constitute sufficient justification for dismissal of Police Officer John C. Nunley from his position with the Police Department, County of Nassau, I am not unmindful of the fact that a judgment entered February 3, 1976 based on a jury verdict in the case of *Laskowski et al* v. *County of Nassau, et al.*, in the amount of over $77,500 was rendered against, among others, John C. Nunley, for false arrest and assault, which included punitive damages.

IT IS FURTHER ORDERED, that John C. Nunley, Police Officer, Shield Number 1271, 8th Precinct, Serial Number 4159, be dismissed from his position of Police Officer in the Police Department, County of Nassau, New York and that his name be dropped from the rolls of said Police Department, as of the 6th day of July at 2400.

Dated at Police Headquarters
Mineola, New York
July 6, 1977

/s/ DANIEL P. GUIDO
Daniel P. Guido
Commissioner of Police

Letter From William S. Norden

(Letterhead of COUNTY OF NASSAU)

(Office of the County Attorney)

March 15, 1978

Clerk
Appellate Division, Second Dept.
45 Monroe Place
Brooklyn, New York 11201

Re: Nunley v. Guido (Police Disciplinary)
An appeal Calendared for March 16, 1978
Marked Submitted

Dear Sir:

Enclosed please find the original and copies of the superseding information (CR 303B/77) in the criminal matter of *People* v. *John C. Nunley,* minutes of the dispositional hearing in the same criminal matter held on September 12, 1977 at the District Court of the County of Nassau, Criminal Part III, before Hon. Henry J. Kalinowski, D.C.J., and the transcript of the record regarding the disposition of the same criminal matter.

In said criminal matter, the gravamen of defendant's offense is that defendant fired two bullets into a cigarette machine at a public bar. This was the underlying unlawful conduct that formed the basis of the Nassau County Police Department Charges and Specifications served on Police Officer Nunley on January 6, 1977.

This Court is asked to take judicial notice of the enclosed documents as to the relevancy of petitioner's plea

of guilty in the criminal matter and thereby admitting the truthfulness of the allegations in the complaint.

Thank you for your cooperation in this matter.

Very truly yours,

EDWARD G. MCCABE
County Attorney of Nassau County

By /s/ WILLIAM S. NORDEN
William S. Norden
Senior Deputy County Attorney

WSN:sg
Encs. Original & 21 copies
cc: Hartman, Morganstern &
Lerner, Esqs.
Attorneys for Petitioner

Information

DISTRICT COURT OF NASSAU COUNTY

FIRST DISTRICT: CRIMINAL PART

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

JOHN C. NUNLEY,

Defendant.

STATE OF NEW YORK,
COUNTY OF NASSAU, *ss.*:

Det. Sgt. Robert Ledford, Shield No. 26, I.A.U., being duly sworn, deposes and says that he is a member of the Police Department, County of Nassau, and that on the 5th day of December, 1976 at Mother's Pub, 597 Hicksville Road, Bethpage, in the County of Nassau, between the hours of 8:00 P.M. and 11:00 P.M., JOHN C. NUNLEY, the defendant did violate Section

COUNT ONE:

265.35 Subd. 3a, Prohibited Use of Weapons, when he wilfully discharged a firearm in a public place; and Section

COUNT TWO:

265.35 Subd. 3a, Prohibited Use of Weapons, when he wilfully discharged a firearm in a public place and where a person could be endangered thereby. This count is separate and distinct from Count One. And Section

Information

COUNT THREE:

145.00 Subd. 1, Criminal Mischief in the Fourth Degree, when, having no right nor reasonable grounds to believe he had such right, he intentionally damaged the property of another person; and Section

COUNT FOUR:

120.20, Reckless Endangerment in the Second Degree, when he recklessly discharged a firearm thereby creating a substantial risk of serious physical injury to another person, to wit:

The defendant, JOHN C. NUNLEY, at the time and place aforesaid, did discharge a firearm into a cigarette vending machine which was in the custody of George Stamatis and Mother's Pub, thereby causing said machine to become damaged. Shortly thereafter the said defendant, while in close proximity to George Stamatis and other persons, did again discharge a firearm into the same cigarette machine causing further damage thereto. Both discharges occurred within the confines of the alcove in front of Mother's Pub during business hours with patrons on the premises.

The preceding is based upon personal knowledge as well as information and belief, the source of information and basis for belief being the observations of George Stamatis whose deposition is attached hereto.

/s/ ROBERT LEDFORD

Sworn to before me this
day of , 1977

.....

Judge, District Court of
Nassau County

Supporting Deposition of George Stamitis

On Sunday evening, December 5, 1976, I was working at Mother's Pub, 597 Hicksville Road, Bethpage, New York. Some time that evening, Peter Safchuk came into Mother's with a person I now know as John Nunley. A little later on, I heard a noise up front. The barmaid told me it came from the alcove in front of Mother's where the cigarette vending machine is. I later went up front to the alcove and saw the glass on the cigarette machine had been broken.

Later on that evening, John Nunley came up to me while I was in the kitchen of Mother's Pub and told me, in substance, that he wanted to pay for the damages. He had money in one hand and a revolver in the other. I then went with John Nunley to the alcove at which time he said, in substance, that if he had to pay for the damages he might as well do a good job. Whereupon, Nunley shot the cigarette machine once.

When the Police arrived later that night, I observed the cigarette machine with two holes in it.

I understand that any false statements made herein are punishable as a Class A Misdemeanor pursuant to Sec. 210.45 of the Penal Law.

/s/ George Stamitis
George Stamitis
26 Belmont Drive
Huntington, New York

Dispositional Hearing

DISTRICT COURT OF THE COUNTY OF NASSAU

State of New York : First District : Criminal Part III

Index No. CR303B/77

The People of the State of New York,

—against—

John C. Nunley,

Defendant.

Taken: September 12, 1977
at Mineola, New York

Before:

Hon. Henry J. Kalinowski,

District Court Judge.

DISPOSITION

Appearances:

Russell, Corker, Esq.
Assistant District Attorney
For the People
Mineola, New York

John R. Lewis, Esq.
Attorney for Defendant
One Old Country Road
Carle Place, N.Y.

Reported by:
George L. Lentini
Official Court Reporter

Disposational Hearing

The Court: People v. John C. Nunley.

Mr. Corker: Your Honor, the gravemen of the defendant's offense at this time, is that the defendant fired two bullets into a cigarette machine at a public bar. At this time I would ask the Court to accept a plea—a reduce plea of disorderly conduct, in violation of section 240.20 sub-division 7 of the Penal Law in the interest of justice and in the interest of Judicial Economy.

I also bring to the Court's attention as a direct result of his actions Mr. Nunley has been dismissed from the police force.

I further bring to the Court's attention the fact that the vending machine in question was damaged to the sum of approximately $100.00 to $150.00.

The Court: Now, we are going to take a plea to disorderly conduct with respect to which count?

Mr. Corker: With respect to the entire information, Your Honor. The one disorderly conduct will be in full satisfaction of all charges against Mr. Nunley arising out of this incident.

The Court: Wouldn't it be more simple to take a plea to one of the counts and dismiss the others in satisfaction?

Mr. Lewis: Yes, Your Honor.

Mr. Corker: It was my understanding that we are dealing with a Class A Misdemeanor and I would amend one count to read disorderly conduct and the remaining counts I would move to dismiss in satisfaction of the plea of guilty to the one reduced charge.

Mr. Lewis: What about count 3?

Mr. Corker: The criminal mischief I would move to amend that to read disorderly conduct.

The Court: Count 3.

Mr. Corker: That's 145.00 sub-division 1, criminal mischief.

Disposational Hearing

The Court: 240.20 Sub-division 7.

Mr. Corker: Yes, Your Honor.

The Court: The defendant is originally charged with four counts, each being a Class A Misdemeanor. He is entitled to a Jury Trial with respect to each count. By taking a plea of guilty you thereby are waiving your right to a Jury Trial, is that correct?

The Defendant: Yes, sir.

The Court: Also, by taking a plea of guilty, even though it's to a reduce count, disorderly conduct, under 240.20 Sub-division 7; by taking such plea you thereby are admitting to the truthfullness of the allegations in the complaint filed against you.

The Defendant: I understand.

The Court: You are about to take this plea and you do so voluntarily after full consultation with your attorney?

The Defendant: Yes, sir.

The Court: I have indicated to counsel that I was going to give you a conditional discharge as your sentence. However, a condition of the conditional discharge will be—and the only condition is that you make restitution to the owner of the machine. I haven't made any other promises. Have any other promises been made to you?

The Defendant: No other promises.

The Court: At this time, with respect to count three, which has now been amended to disorderly conduct. You withdraw your original plea of not guilty to the original charge and now enter a plea of guilty to the amended charge, charging you with disorderly conduct?

The Defendant: Yes, I do.

The Court: Any legal reason why sentence should not be pronounced?

Mr. Lewis: No, Your Honor.

Disposational Hearing

The Court: Wish to be heard?
Mr. Lewis: No, sir.
Mr. Corker: People do not wish to be heard, sir.
The Court: Does the defendant wish to be heard?
The Defendant: No, sir.
The Court: The sentence of this court is a conditional discharge, with resititution (sic). Restitution, how soon can you make payment?
The Defendant: Upon demand.
Mr. Lewis: Thirty days.
The Defendant: That will be fine.
The Court: Restitution to be made within thirty days.
Mr. Lewis: Will he make that directly to the owner of the machine, Your Honor?
The Court: Yes. I strongly suggest, counselor, that you make arrangements for it. Get yourself a general release and then the court will hold you chargeable with the advice that payment has been made.
Mr. Lewis: Yes, sir.
The Court: As to the First, Second and Fourth Counts of the information, they are dismissed in satisfaction to plea taken in count three on motion of the district attorney.
Mr. Corker: That's correct, Your Honor. People so move.
The Court: The defendant is advised he has the right to appeal from the judgment of this court within a period of thirty days.

CERTIFICATION:

I hereby certify that the above is true and accurate.

/s/ GEORGE L. LENTINI
George L. Lentini
Official Court Reporter

TRANSCRIPT OF RECORD

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT, CRIMINAL PART
400 County Seat Drive
Mineola, N.Y.

On September 12, 1977, John C. Nunley
(name)
111 Lincoln Place Massapequa, NY
(address)
appeared in this court after having been charged with violating Section
vio-sec 265.35 sub 3aPL(1st.ct) 265.35 sub 3APL(2nd.ct)
vio-sec 145.00 sub 1PL(3rd.ct) 120.20 PL(4th.ct)
and that the disposition of said charge was as follows:

On 9/12/77 defendant Pled Guilty to amended section of 240.20(7)PL on 3rd. count. Count 1, 2, & 4 dismissed. Count 3 sentenced to Conditional Discharge. Hon. Henry J. Kalinowski

I hereby certify that the foregoing is a true transcript of the record on file in this court.

Date March 14, 1978
Index No. CR# 303B/77

/s/ RITA D'ANTUONO
Clerk of the Court

Rita D'Antuono dot

(SEAL)

New York State Civil Service Law: Section 75

TITLE B—REMOVAL AND OTHER DISCIPLINARY PROCEEDINGS

§ 75. *Removal and other disciplinary action*

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee in the state service holding a position in the non-competitive class other than a position designated in the rules of the state civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into state service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class.

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such a hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Com-

pliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than three years after the occurrence of the alleged incom-

petency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

Nassau County Administrative Code, Section 8-13.0

§ 8-13.0 *Discipline and punishment.* a. The Commissioner shall have power to discipline a member of the force by:

1. Reprimand;
2. Fine;
3. Suspension, with or without pay;
4. Dismissal or removal from the force; or
5. Reducing him to any grade below that in which he was serving, if he be above the grade of patrolman, after which his compensation shall be the same as that allowed to members of the grade to which he is reduced.

b. Such members shall be disciplined for the following reasons only:

1. Conviction for any criminal offense;
2. Neglect of duty;
3. Violation of rules;
4. Neglect or disobedience of order;
5. Incapacity;
6. Absence without leave;
7. Conduct injurious to the public peace or welfare;
8. Immoral conduct;
9. Conduct unbecoming an officer; or
10. Any other breach of discipline.

Nassau County Administrative Code, Section 8-13.0

The commissioner may designate a captain to conduct hearings on charges against lieutenants, sergeants and patrolmen and to report his findings and recommendations to the commissionor for action thereon. In case of disciplinary action by fine, not more than thirty days' pay shall be forfeited and withheld for any offense.

c. The commissioner shall remove or dismiss any member of the force only after:

1. Written charges are preferred against and served upon such member, and
2. Such member shall have had an opportunity to be publicly heard and examined before the commissioner.

d. A petition to review a determination by the commissioner to fine, suspend, dismiss or otherwise discipline a member of the police force shall not be granted after the expiration of thirty days from the service of a notice of such determination upon the member of the force so fined, suspended, dismissed or otherwise disciplined.

(Amended by L. 1948 Ch. 436, in effect March 23, 1948.)

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